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In The

Supreme Court of the United States

October Term, 1995

JODY M. BERARDI,

Petitioner,

vs.

ANHEUSER BUSCH, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was evidence of intimidating and harassing phone calls made to a plaintiff in a Title VII gender discrimination case, properly excluded for lack of authentication that the calls had been made by an employee of the defendant, when the evidence before the district court demonstrated that the defendant's own security and personnel officers had concluded from the available facts that the caller was from the defendant's facility and had so informed the plaintiff?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
RULES INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 19
CONCLUSION 30
APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Allen v. City of Montgomery, 788 F.2d 1485 (11th Cir. 1987) 22

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988) 20, 21

Harris v. Forklift Systems, Inc., ___ U.S. ___, 114 S.Ct. 367 (1993) 19, 20, 30

Hawkins v. Hennepin Technical Center, 900 F.2d 153 (8th Cir. 1990) 21

Hukkanen v. International Union of Operating Engineers, 3 F.3d 281 (8th Cir. 1993) 27

Paroline v. Unisys Corporation, 879 F.2d 100 (4th Cir. 1989) 27

Phillip v. ANR Freight Systems, Inc., 945 F.2d 1045 (8th Cir. 1991) 21

Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987) 20, 21

United States v. Pool, 660 F.2d 547 (5th Cir.Unit B Nov. 1981) 26, 27, 28

FEDERAL RULE OF EVIDENCE

Rule 901 of the Federal Rules of Evidence 2

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jody M. Berardi, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit, to review the judgment of the Court of Appeals filed on February 16, 1995, affirming a judgment of the United States District Court for the Eastern District of Missouri.

OPINIONS BELOW

The opinion of the Court of Appeals was filed on February, 16, 1995, and appears herein as Appendix A. The opinion was unpublished. The order of the Court of

Appeals denying the petition for rehearing and suggestion for rehearing en banc was filed on April 7, 1995, and appears herein as Appendix B. The order and judgment of the district court, along with its memorandum opinion, as to the claims which were triable to and decided by the court, was filed on April 15, 1994, and appears as Appendix C. The judgment of the district court as to those issues which were decided by the jury, was filed on August 13, 1993, and appears as Appendix D.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit in this matter was filed on February 16, 1995. The Court of Appeals extended the time for filing a petition for rehearing in the case to and including March 16, 1995, and petitioner filed a motion for rehearing, with a suggestion for rehearing en banc, within the proper time as extended by the Court.

The Court of Appeals filed its order denying the petition for rehearing on April 7, 1995, and this petition for writ of certiorari is timely filed within ninety (90) days of that date. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 901 of the Federal Rules of Evidence, set forth in Appendix E.

STATEMENT OF THE CASE

This is an action to recover for gender discrimination in employment, retaliation for the exercise of protected rights, and constructive discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., (Title VII), and the Missouri Human Rights Act, Section 213.010, et seq., R.S.Mo. 1986 (MHRA).[1] Petitioner Jody M. Berardi (hereinafter "Petitioner" or "Berardi"), began work for Respondent Anheuser-Busch (hereinafter "Respondent" or "A-B") as a union freight handler in 1985. She presented evidence at trial that she encountered a hostile working environment from the beginning of her work history at A-B, inasmuch as when she worked as a freight handler, gender based derogatory or sexual comments and pornographic materials were common in the workplace, and women were singled out for less desirable jobs and working conditions.

Berardi sought the opportunity to become a brewing supervisor. After being told by an A-B personnel officer she would need a college degree to do so, she completed her degree and passed a battery of tests and interviews required for entry into A-B's Research Pilot Brewery (RPB) program in St. Louis. The RPB trains and develops

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[1] The transcript of the trial in this matter is contained in five volumes. Four volumes were prepared by court reporter Lynn Schrum. References to these transcripts will be as follows: (1:13), for Vol. 1, p. 13 on the Schrum transcripts. The fifth volume was prepared by Norma Magnano and references to this transcript will be as follows (M. 12). References to Plaintiff-Appellant's appendix will be shown as: (A. 13).

people in the brewing process, in preparation for employment as brewing supervisors at A-B's various facilities throughout the country. Berardi began in the RPB in June, 1990. At about the same time she started in the RPB, Berardi began to receive a series of intimidating and harassing phone calls. The issues presented by this Petition for Writ of Certiorari involve the district court's order granting a Motion in Limine to exclude all references to these phone calls at trial. Thus, the facts concerning these calls are set forth below in greater detail. The circumstances surrounding these calls were set forth in Berardi's affidavit filed in response to a defense motion for partial summary judgment as follows (A. 82-85, emphasis supplied):

> 11. Two days before I was to start work at the RPB as a brewing supervisor trainee my mother Shirley Levi received a call from a person who identified himself as Jeff Dunnigan from Anheuser-Busch stating that he had misplaced my number and needed to call me concerning working some overtime. My mother gave him my unlisted number and then called me and advised me of the phone call. See Aff. of Shirley Levi, Par. 1 and 2. I stated that it was unlikely that they would be wanting me for overtime since I had already checked out of that job and was scheduled to start the new job on Monday. Although Jeff Dunnigan was my foreman my actual boss was Connie Jocobi. Within several hours I received the first of a series of harassing phone calls. The caller made obscene remarks and sexual suggestions to me and made some specific comments about me that worried me that he might know quite a bit about me. I immediately became concerned not only

because of the nature of the calls but because it appeared to be connected to work. The call to my mother was from someone identifying himself as an Anheuser-Busch employee and it regarded a matter relating to work. *It is extremely unlikely that anybody not from the company would have known that Shirley Levi is my mother and known to call her to get my number. My father and two brothers have all worked at the brewery and my relationship to them was known at Anheuser-Busch. Also nobody who was not familiar with my previous working situation at Anheuser-Busch would have known that Jeff Dunnigan was my boss inasmuch as he was my working foreman, not my actual boss.* I later checked with Jeff Dunnigan and learned that he had not called my mother.

12. These calls continued in the following weeks and within a couple of weeks I called the telephone company and the police to report them in order to put a tap on the phone to try to catch and identify the caller. The calls continued though July and August and the caller identified himself as David Green, not a person I could identify.

13. In August of 1990 I received a threatening letter and I contacted the police. I was going on vacation at the end of August but on September 24, 1990, *I was still concerned about the letters and phone calls and called the employee assistance plan (EAP) at Anheuser-Busch. I spoke to Julia McCollum. I advised her that I was by then very frightened and she insisted based on the facts that I told her that I make an appointment with security at Anheuser-Busch because it seemed to be a problem related to work. . . .*

. . . 15. *At Ms. McCollum's recommendation I made an appointment with security and talked to one Ron Grob. Mr. Grob advised me that he thought the phone calls had to be from somebody who had access to my personnel file, based on the facts which I outlined above.* He also advised me that I would not get fired for carrying a gun to work and recommended that I transfer out of the department. *Two days later I met with Dennis Voisey, the Labor Relations Manager, who told me he was involved because Mr. Grob thought this was an employee relations issue. He indicated that he agreed with this assessment.*

16. On October 1, 1990, I met with Mr. Voisey, Albert Linnebach and Dominic Viviano, my supervisors. *Mr. Voisey again indicated again based on the knowledge of my family and knowledge of my previous supervisor he thought that the caller had to be somebody from the brewery.* On this occasion I was given a tour of the RPB, a large separate building. I was shown every exit, every alarm. A discussion was had as to how I might get away if someone should threaten me while I was working alone in the RPB. I worked alone there fairly often on night and weekends. I was given a two way radio for security and arrangements were made to escort me to my car and off of the premises if I was working at nights or on weekends. I felt very concerned that working alone in the RPB or even working alone there with certain other employees, such as David Ramsay.

17. The very same night I was working, and my supervisor Dominic Viviano told me to use a particular hose. This hose ruptured causing a noisy explosion and some release of CO_2.

> Afterwards, Mr. Viviano told me he knew that was a bad hose. Subsequently the same night when I was working alone a second hose exploded on me and I feared that someone was deliberately sabotaging my equipment. I did not come into work the next day but on the following day I came in and a third hose ruptured. This is not an experience I had ever had before.

The deposition of Linnebach, who was the manager of the RPB, confirmed that Berardi was complaining about the phone calls, and that she, Linnebach and Dennis Voisey met about the matter and that she also expressed concern that, with respect to the hose incidents, someone had sabotaged her work (A. 382-83). She had already reported the phone calls to the company when he learned of them (A. 384). A-B gave her a radio to have with her at all times when she worked weekends so she could be in contact with plant security (A. 384). When it appeared she was still shaken by the calls, she was transferred into the brewhouse where she had day hours (A. 384). Indeed at trial, it appeared that a number of defense witnesses were quite aware of the phone calls as defense counsel at least twice interrupted her own examination of her own witnesses for off-the-record conferences. The context of each of these occasions suggests that the witness was being reminded not to mention the calls (3:154-155, Linnebach; 4:66, Emig) and defense counsel at one point stated on the record that she had so instructed her witnesses (4:247). In his deposition, Don Burnell, the manager of brewing human resources for A-B, acknowledged being aware of the harassing phone calls and having discussed Berardi's concerns with other

members of A-B management, including Beverly Kukuljan, his assistant; Camille Emig; Albert Linnebach; Dr. Cutaia, Mr. Kramer (the brewmaster), and Mr. Colombatto (A. 390-92).

As a result of the District Court exclusion of any references to the phone calls, all of the above evidence was excluded, with the exception of the incidents involving the hoses. Because of the exclusion of the phone calls and all references to them, this evidence was presented in isolation and out of context.

Thus, at trial, Berardi testified that on October 1, 1990, she was doing a job she had been doing for months, rinsing hoses which had been used in order to sterilize them (1:91). There are pumps between the lines, pressurizing the lines, and there is CO_2 gas in the lines (1:91). There is a pressure of 18 pounds per square inch in the hoses (4:51-52). Each hose has a stainless steel ferrule that fits inside the hose, with two stainless steel bends on the outside to hold the hose in the ferrule (4:45). In this instance, the hose blew off right at the pump (1:91). Berardi had done this job many times before and had never had a hose blow up at the pump (1:91). Later that night of October 1, 1990, she was working with her foreman, Dominic Viviano, who told her to get a hose to "drop a beer." (1:91). They hooked up the hose to the tank and when Berardi turned on the valve, the hose blew up with CO_2 gas going everywhere and the hose going wild (1:91-92). This was a situation in which she could have been injured because her head was right under the tank when the hose blew (1:175-76). Viviano had instructed her in what to do and after the hose blew, Berardi testified that he told her that it was a bad hose and he didn't

know why he had told her to use it (1:92). She was off the next day and when she returned the following day, she saw a bad hose in the elevator (1:92). Viviano told her to take it downstairs for repair but when she returned the hose was gone (1:92). She reported this to Viviano who confirmed that he too had seen the hose in the elevator (1:92). He then instructed her to set up the hoses to drop a beer. She set up the hoses and checked to make sure everything was correct because of the two previous incidents (1:92-93). When she returned from turning on the water, another hose was blown (1:92).

At this point, petitioner's counsel indicated that he wished to introduce evidence of the phone calls and made an offer of proof (1:93), inasmuch as the court had reaffirmed its ruling on the Motion of Limine in chambers at the start of the trial (1:1-7). The offer of proof included Berardi's affidavit and other pretrial material offered in opposition to her Motion in Limine (1:93). Without being allowed to explain her concerns by reference to the harassing phone calls, she then testified that in September 1990, she spoke with Julia McCollum in the EAP, and told McCollum that she was very upset about "some of the things that was happening on the job." (1:94). McCollum insisted that Berardi go to plant security and Berardi accordingly saw Ron Grob, who was acting head of security, while Ron Roach, the head of security, was on vacation (1:95). At this point the following took place:

> Q. And again, without going into the details, did Mr. Grob make any recommendations to you?
>
> MRS. ROWE: Your Honor, if we might approach the bench?

THE COURT: Okay.

(The following conference was held at the bench:)

MRS. ROWE: Your Honor, I think that the plaintiff's reason for going to the security department had to do with the phone calls. I anticipate she's going to say that Mr. Grob told her to carry a gun in her affidavit.

THE COURT: We're not going into that.

MR. LIBERMAN: What? No, I'm trying to avoid that.

THE COURT: Well, yeah.

MRS. ROWE: It is all related to that.

THE COURT: That is the only purpose of it, isn't it?

MR. LIBERMAN: No, the purpose is to show that they started taking security precautions on her. . . .

. . . .

THE COURT: Okay. I'll sustain the objection.

MR. LIBERMAN: May I just be heard then?

THE COURT: All right.

MR. LIBERMAN: There has been an assertion made that Miss Berardi is paranoid, Miss Rowe in her opening statement, so I think this evidence goes to show that she was – most of the things she did, she did just on the advice of what they told her.

> THE COURT: Okay. Well, if she – the guy who told her to carry the gun doesn't know whether she's paranoid or not, he hasn't made any analysis of it. I'll sustain the objection. (1:95-97).

The objections effectively prevented Berardi from describing the meetings she had with A-B security, and in the RPB with Voisey and Grob, concerning her safety, and the concern shared by the A-B people that an A-B employee was responsible for the calls, nor was she allowed to describe the precautions taken for her safety as a result. Restricted to discussing the hose incidents, Berardi testified that she had reported these incidents to plant security (Grob), corporate security (Donna Bulus), Gerhard Kramer (St. Louis Brewmaster), Dennis Voisey (employee relations), Camille Emig (personnel communications) and the safety department (Ed Littlejohn) (1:98-100). She was referred to Ed Littlejohn in the safety department by Donna Bulus. Bulus asked if that would make anyone mad and Berardi told her it would make Al Linnebach mad (1:100-101). By the time Littlejohn investigated, the hoses involved had been removed and repaired (1:101). Littlejohn told Berardi the odds of these incidents occurring in this way were 1 in 1000 to 1 in 1,000,000, and he instructed her to document everything that she did and happened to her (1:102). Littlejohn's written report of his investigation indicated that he had observed Berardi perform the procedure and saw no physical abnormality with the connection for the hoses that would cause a failure and no faulty action on her part (4:186-87).

Berardi testified that from the time she went to security and spoke with Grob, she wanted to get out of the

RPB (1:104). Because of the ruling on the Motion in Limine, the only reasons the jury heard for this desire were her on-the-job treatment by Ramsay, Viviano and Linnebach.

Berardi had ongoing discussions with an A-B personnel ombudsman, and continued to share her fear about these incidents,[2] as well as her treatment in the RPB (4:65-74). The ombudsman acknowledged that Berardi was "terrified" and that this information had been passed along to Don Burnell (4:72-73), who also acknowledged having been told that Berardi was "terrified" and believed someone was out to get her (4:176). Berardi told the ombudsman that she wanted a different position or an opportunity in a different department or plant, and this too was passed on to Burnell (4:73-74).

By February, 1991, Berardi desperately wanted to get out of the RPB and began trying to return to union ranks. She was first told by the union this could not be done unless all laid off union people were first recalled (1:110-113), and then told by A-B on May 31 that it would not be permitted at all (1:114-115). Berardi interviewed in Columbus, Ohio for a brewing supervisor training position. She was offered a job, but decided to decline the job because the woman before her who left the RPB, was also

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[2] The ombudsman did not mention the calls due to the ruling in limine. Nevertheless, it was evidently difficult for her to describe her discussions with Berardi without mentioning the calls, and defense counsel interrupted her direct examination of this witness for an off-the-record conference in which the witness was clearly instructed to stay away from the phone calls (4:66).

sent to Columbus and was fired shortly thereafter (1:109-110). She had also been told in Columbus that there would be mandatory 12-hour shifts on Saturday and Sunday every other weekend, and that several of their people had quit or were having problems with those hours (1:107-108). The idea of the mandatory Saturday and Sunday 12-hour shifts every other weekend on a permanent basis also presented a problem to her, because of child care arrangements for her daughter (1:108, 110). She felt that taking the Columbus job would set her up for a fall (1:110).

Berardi then filed a charge of discrimination with the E.E.O.C. on June 7, 1991 (A. 441-450) generally alleging gender discrimination because she had not been allowed to return to a union job. Don Burnell, who was responsible for selecting resumes to furnish to the various A-B breweries when they had openings for brewing supervisors, testified that he learned that she had filed an E.E.O.C. discrimination charge in the middle to the 2/3 point of June, 1991 (4:181).

In her affidavit, which was part of Berardi's offer of proof she stated that:

> 35. After my filing of the charge the calls resumed again. At this time the calls were less frequent and not as explicit as before. The calls would occur late at night or around 3:00 a.m. The caller would simply hang on the line and not say anything.

(A. 88). This evidence did not come in as a result of the Order in Limine.

On July 3, 1991, Berardi met with Don Burnell, Al Linnebach and Beverly Kukuljan (1:118). She was informed at that time that she was not selected for the Houston plant, where she had recently interviewed (1:118). She was also informed that her file had also been sent to Meramec, Baldwinsville, and St. Louis for consideration for a foreman's position (1:118), but that she had not been selected. She was told that either Baldwinsville or Meramec said she needed more planning and scheduling and that St. Louis said she needed another year of training (1:118). She was then informed that since these breweries did not want her, her file would not be sent out to any other breweries for any openings for six months to a year (1:118-119). Berardi asked them why David Bradford had been hired as a brewing supervisor in June (1:119). She had worked with Bradford as a freight handler and, in fact, he had been hired after her (1:119-121). He had not been through the RPB and did not have a bachelor's degree (1:119), whereas when Berardi had first sought to become a brewing supervisor, she was told she would have to have both of these qualifications. She was told that Bradford was a brewer, that he had brewing experience. Berardi knew this to be an impossibility (1:122). It is against union rules for a freight handler to do a brewing job (1:121-122).

At trial A-B sought to explain Bradford's hiring and its timing by the claim that it had selected him for the position long before June, 1991, in order to honor a commitment to hire a supervisor from union ranks, but could not do so until June, 1991 due to a corporate wide hiring freeze (4:97-98, 108). A-B argued that the freeze on hiring applied to all breweries corporate wide and lasted from

sometime in late 1989 or early 1990 until June, 1991. There was undisputed testimony, however, that 14 brewing supervisors were hired by A-B between early 1990 and June, 1991, the time in which the "freeze" was supposed to have been in effect. A-B also suggested that Berardi was passed over in favor of Bradford due to her absentee record (she had missed nine days of work) and lack of supervisory experience (4:100-102), but Bradford's own testimony indicated that A-B had thought it necessary to counsel him for excessive absenteeism, and that he had never worked in brewing and had only minimal supervisory experience which was not related to the brewing process (4:276-277).

After being told that her resume would not be sent out to any breweries for six months or a year, she felt that her every effort to get out of the RPB was being blocked (1:123). She had wanted to leave the RPB ever since the preceding October, 1991, as set forth above, because of her anxiety and fear arising from the phone calls, hose incidents, and other events in the RPB. She now knew she could not leave the RPB by going back to the union and she could not interview (1:122). She was going to be in the RPB for at least another six months to a year (1:122). She became more and more frustrated at her inability to get out of the RPB as time went on (1:123). She was having nightmares and panic attacks. She was not eating or sleeping. She was stressed out all the time, and still scared to death (1:123).

She began to see a psychiatrist, Dr. Ardekani, through the A-B EAP in August 7, 1991 (1:123). She then was on a medical leave of absence from September, 1991 through February, 1992 (1:124).

Berardi called two witnesses to testify with respect to the effects and symptomatology she suffered as a result of the events set forth above. However, the testimony of these witnesses was also in effect severely limited by the ruling in limine excluding references to the harassing phone calls. Lois Daniels, a social worker who has a masters in behavioral science and a Ph.D. from Washington University, accepts referrals from A-B (3:13-15), and Dr. Ardekani both testified concerning Berardi's condition in this limited fashion. Their testimony indicated that Berardi suffered from a very high level of anxiety, stress and depression. Both Daniels and Ardekani related this condition to Berardi's working situation, although neither was permitted to refer to the phone calls. Dr. Ardekani diagnosed her as having depression and anxiety disorder, and suggested hospital treatment. When he released her to return to work in February, 1992, Dr. Ardekani indicated that if she returned to work and was exposed to sexual harassment on the job, her symptoms of anxiety and stress might return (3:62, 67-68). Comparison of the trial testimony of these witnesses with their deposition testimony reveals that they were unable to describe the source of these symptoms because of the Order in Limine.

By contrast, in deposition, without the restriction of the Order in Limine, Daniels testified that in their sessions, she and Berardi talked mainly of her job situation and the threats she was receiving over the phone (A. 264, 268, 274, 288-89, 298). When Daniels first saw her in October, 1990, Berardi was very stressed and anxious. She was having difficulty eating and sleeping and was very fearful (A. 267). When she talked about the phone calls, her hands were shaking and she was hyperventilating (A.

268). Daniels testified at deposition that the events of the job, including the phone calls and the difficulties in the RPB program caused Berardi to suffer a medically significant emotional injury (A. 274, 281, 288-89, 298-99, 307). Testimony of this tenor from Daniels was excluded at trial due to the Order in Limine.

In deposition, without the limitations of the Order in Limine, Dr. Ardekani's testimony contained frequent references to the harassing phone calls. Berardi had related that she had received these obscene calls to the point where she couldn't sleep, and had become angry, nervous and anxious; that someone didn't want her in the job at the RPB and was calling to drive her out of her mind (A. 310, 315, 321, 324, 347-48, 352-353, 367, 377, 379). The phone calls were a stressor that had caused her to suffer post-traumatic stress symptoms (A. 340-341). Dr. Ardekani was unable to describe his interaction with her without making references to the work situation and phone calls.

Berardi also testified that she entered a hospital outpatient program for three weeks (1:124). She made attempts through the EAP to get a different position with A-B while she was on leave in October, 1991, but she was not successful. She was not given any option other than going back to the RPB (1:125-126). In her deposition, she testified that another call was made to her home in October, 1991, in which the caller played the A-B jingle over the line (A. 720). There was at least one other call in October (A. 420). Again, this evidence was not presented at trial due to the Order in Limine.

After October, 1991, Berardi never reached the point where she was feeling well enough or comfortable enough to return to the RPB (1:126). However, her disability leave was due to expire in 3/92, and she decided to return (1:126). When she thought about returning, she would get stressed out and cry (1:126).

The following was set forth in Berardi's affidavit, and was not introduced at trial due to the Order in Limine (A. 90).

> 47. In February, 1992 I call Albert Linnebach about my check. I got a harassing call the same day.
>
> 48. In February, I received a call stating that I was a "bitch", and another call stating that "Its David" again. My mother received a call in late February 1992, informing her that Kristen was in the ice box. Kristen is my daughter. See Levi Aff., Par. 3. This call was several days before I was scheduled to go back to work.

At trial, Berardi testified that after her return to work she still did not feel safe in working with David Ramsay (1:127). The weekend prior to her resignation, she had to work alone in the RPB. Dominic Viviano told her Ramsay would be in and out of the building and she would not be able to know when he was coming or going (1:127). She did not trust Ramsay and was scared. She asked for and was given a radio. She was terrified the whole weekend and finally said "I am no longer working like this." (1:127-28). She resigned in May, 1992.

Berardi has not had any more anonymous phone calls since leaving A-B, except for one just prior to the date set for her deposition in this case (A. 91).

Eight separate claims under the MHRA were submitted to the jury for decision at the close of the evidence, including: Berardi constructive discharge claim based upon gender relating to her departure from the RPB, and her claim for constructive discharge based upon retaliation for filing a charge of discrimination.

The jury returned a verdict in favor of A-B, and against Berardi on all of the foregoing claims and the District Court entered judgment in accordance with the verdict (A. 239). The District Court adopted jury verdict in regard to the Title VII claims (A. 253, 258). Berardi timely appealed the judgment, challenging the Order in Limine excluding all reference to the phone calls. The Court of Appeals affirmed. Berardi now asks this Court to issue its writ of certiorari to the Court of Appeals.

REASONS FOR GRANTING THE WRIT

In *Harris v. Forklift Systems, Inc.*, ___U.S.___, 114 S.Ct. 367 (1993), this Court held the Title VII right to be free of an abusive or hostile work environment based upon gender was not limited to cases in which a serious effect on the employee's psychological well being was shown. However, this Court emphasized that such serious psychological harm was highly relevant in determining liability in an abusive or hostile work environment case. This Court held that:

> *But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances.* These may

> include the frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the employee actually found the environment abusive.

Harris v. Forklift Systems, Inc., ___U.S. at ___, 114 S.Ct. at 371 (1993) (emphasis supplied).

The Order in Limine excluding all reference to the intimidating phone calls received by Berardi improperly and unfairly preventing her from presenting her case to the jury, and did so in a manner that is inconsistent with the foregoing standard emphasizing review of all of the circumstances. Such blanket pre-trial evidentiary exclusions are improper, especially in a Title VII case. In *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1102-1103 (8th Cir. 1988), the court reversed a defense jury verdict due to improper exclusion of the plaintiff's evidence in limine, stating:

> . . . the Court's exercise of its discretion must not unfairly prevent a party from proving his case. In this case, we examine the consequences of the trial court's exclusions with particular care, since the court's determinations of probative value and prejudice were made before trial began, rather than during the development of the plaintiff's case before the jury. *See Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987).
>
> The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to

disbelieve an employer's account of its own motives. Judge Posner has explained:

> [d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it. . . . The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were a different race, sex, religion, or national origin but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for . . . firing . . . a worker who is not superlative. A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.

Riordan, supra, 831 F.2d at 697-98.

Estes, 854 F.2d at 1102-1103. In *Hawkins v. Hennepin Technical Center,* 900 F.2d 153 (8th Cir.) *cert. denied* ___U.S. ___, 111 S.Ct. 150 (1990), the court again reversed a Defendant's verdict in an employment case because evidentiary restrictions imposed by a pre-trial Order in Limine unfairly prevented the Plaintiff from presenting her claim. *See also Phillip v. ANR Freight Systems, Inc.,* 945 F.2d 1045 (8th Cir. 1991). Such exclusion of evidence in limine mandates a heightened level of scrutiny. As Judge Posner stated in *Riordan v. Kempiners,* 831 F.2d 690, 697 (7th Cir. 1987), (discussed in *Estes, supra*):

> Moreover, as the judge's discretion was exercised on a wholesale basis before trial began, rather than in response to the developing course of the trial, careful appellate review is

> necessary to make sure the judge did not truncate the trial prematurely.
>
> Such review is particularly necessary in a case like this, where the substantive issue is whether there was intentional discrimination in employment. Proof of such discrimination is always difficult.

See also Allen v. City of Montgomery, 788 F.2d 1485, 1488 (11th Cir. 1987) (condemning evidentiary ruling which allowed a "one-sided presentation of the evidence" in discrimination case).

One of A-B's strategies at trial was to directly attack Berardi's credibility on two fronts: One, that she was paranoid and could not perceive reality, and second, that she did not voice any complaints that would justify her level of fear, stress and discomfort on the job, and that such complaints as she did make were solely for the purpose of manipulating A-B management. This strategy was revealed in defense counsel's opening statement as follows:

> [By Ms. Rowe] We believe that the evidence will indicate that Miss Berardi has engaged in a pattern of manipulation, that – and I'll go through later on in my opening statement and tell you how I think the evidence will demonstrate that, but that she never complained about these complaints of sexual harassment or sex discrimination while she was a freight handler and she only complains about in her later positions – that she wanted to try and manipulate her managers, and I'll give you some examples of that or what I think the evidence will demonstrate.

> We believe that the evidence will also show that Miss Berardi has some psychological problems that began long before she began to work at Anheuser-Busch that are related to her childhood and her background, and particular, one of her psychologists, Dr. Daniels, has indicated that she has difficulty with authority figures and that she also has difficulty dealing with male employees.
>
> The evidence will also indicate, and this will come from her treating physician, her psychiatrist, Doctor Ardekani, that at the time he evaluated Miss Berardi, he found her to be paranoid and additionally, we believe the evidence will also indicate that – additional evidence of paranoia will be the fact that Miss Berardi routinely wore a tape recording device underneath her clothing and secretly recorded conversations that she had with her managers and her coworkers while she was employed in the research pilot brewery, and we believe that that evidence will explain in large part of plaintiff's perception of reality which we believe the evidence will indicate is quite different from what really transpired at Anheuser-Busch. (1:34-35)

The execution of the strategy was greatly enhanced by the District Court's Order in Limine excluding all evidence of the harassing phone calls. The statement of facts set forth above demonstrates that the phone calls were an important part of a pattern of events which would cause a reasonable person to be fearful. However, having secured the ruling in limine, defense counsel was in a position to suggest that if there came a point when Berardi was fearful, stressed out or "terrified" while working in the RPB, it was because she was paranoid and

did not have reliable social perceptions. Or alternatively, defense counsel could suggest that if it was not paranoia at work, the incidents and events about which the jury was allowed to hear did not justify this level of fear or stress. Perhaps it was suggested, there is another reason why Berardi made complaints: she wanted to manipulate her bosses.

This strategy was driven home during defense counsel's closing argument. At the very beginning of her argument, immediately after thanking the jury for its attention, defense counsel argued as follows:

> [By Ms. Rowe] Let me begin by saying that this is a story of a person who was unhappy working at Anheuser-Busch. And in particular, she was unhappy during the time that she was in the Research Pilot Brewery. *And if anything caused her unhappiness it was a number of factors that are peculiar to Miss Berardi. You probably understand by peculiar I mean – or part of what occurred are things that are related to her own background and her makeup.*
>
> One of the things that I think affected Miss Berardi in the pilot brewery was her nervousness about being first placed in a salaried position. She never had that kind of work before. It was a challenge for her. She lacked union protection. Her previous employment at Anheuser-Busch had been with the union. *She had a different perspective of reality than I think some of the rest of us might.* And I will go over some examples of that when I talk about some of the events that Miss Berardi finds to be evidence of sexual harassment or evidence of mistreatment of her.

> And her own past history, and I don't want to dwell too much on this, but I think you heard evidence from Dr. Daniels that one of Miss Berardi's – one of the things that Miss Berardi is she has difficulty dealing with authority figures and I think her work history at Anheuser-Busch attests to that fact. . . .
>
> . . . .
>
> Mr. Liberman has indicated that he doesn't think there's – I mean, he's – I mean someone conceded *there's some evidence of the plaintiff's paranoia and I think her suspiciousness as well.* I think that's evident by what our attorney testified to, and I think it's also evident by the fact, if you recall, asking Miss Berardi if she routinely tape-recorded conversations that she had with people she worked with and she said that she did.
>
> . . . .
>
> In addition, Miss Berardi has testified, or Miss Berardi indicated she was afraid of Mr. Ramsay *but I don't think there's been any discussion of any real explanation as to why she would be afraid of her co-worker,* and all she said was he yelled at her a lot. But I don't think that's the kind of event that could make one so miserable in a job that you would feel that your working conditions were intolerable. I suspect that everyone has had that experience before.

(M. 27-29) (Emphasis supplied).

Later in her closing, defense counsel argued as follows:

> [By Ms. Rowe] And with regard to the hose incident, we talked about that and that I think

> there's really no evidence that would support the claims made that Miss Berardi's working conditions were intolerable. . . .
>
> . . . .
>
> . . . Also, you heard from Mr. Linnebach and Mr. Viviano that it was not unusual for hoses to come off the ferrules and have difficulty with the hoses. And you remember we looked at a picture of it to kind of show how many hoses are in that facility. And I submit if you take a look at the maintenance logs, it was not an unusual occurrence for the hoses to come off the ferrules. *So I think the fact that the plaintiff was so concerned about that is just another indication of some of her feelings of persecution that really aren't based on reality.*

(M. 36-37) (Emphasis supplied).

The District Court granted A-B's Motion in Limine, and the Court of Appeals, in affirming the judgment, accepted A-B's argument that Berardi had not sufficiently authenticated the calls. Thus the Court of Appeals stated (see Appendix at page A-4):

> Admission of the phone calls required Berardi to prove that the calls were made by Anheuser-Busch employees. However, Berardi was unable to identify the caller as an Anheuser-Busch employee. The caller did not identify himself as an Anheuser-Busch employee, and Berardi could not identify the caller's voice. The contents and circumstances of the call were also insufficient authentication. *See United States v. Pool*, 660 F.2d 547, 560 (5th Cir.Unit B Nov. 1981) (circumstances alone insufficient authentication).

This conclusion disregards the clear evidence set forth above that the responsible A-B security and personnel people to whom Berardi reported the phone calls all clearly had concluded that the calls were coming from somebody from the brewery, an A-B employee, and that this conclusion had been communicated to Berardi. It is most urgently and respectfully submitted that, in the circumstances of this case, if the evidence was sufficient for A-B personnel responsible for security and personnel issues to conclude that the caller was an A-B employee, and to so advise Berardi, it should be more than sufficient authentication for admission of the calls in this case. As shown above, A-B management officials who later were involved in preventing Berardi from getting out of the RPB by moving back into union ranks, and who were involved in blocking her obtaining a brewing supervisor or trainee position, thereby requiring her to remain in the RPB, were well aware of the calls and surrounding circumstances. They were aware that she was terrified and wanted to get out of the RPB, and these conditions had thereby become part of the working conditions to which Berardi was exposed by being required to remain in the RPB. As such the calls were directly relevant, and were crucial, to Berardi's claims of constructive discharge, for it was foreseeable that these working conditions would lead to her resignation. *Hukkanen v. International Union of Operating Engineers*, 3 F.3d 281, 284 (8th Cir. 1993); *Paroline v. Unisys Corporation*, 879 F.2d 100, 110 (4th Cir. 1989).

United States v. Pool, 660 F.2d 547, 560 (5th Cir.Unit B. Nov., 1981), cited and relied upon by the Court of Appeals, presented a quite different factual situation than

this case and is not really applicable to these facts. *Pool* was a criminal case, requiring proof beyond a reasonable doubt, in which the government's theory on liability required it to show that a specific defendant, and no other person, had been a party to a specific telephone conversation. The phone call was held inadmissible because the evidence was deemed insufficient to show that this specific defendant was the person involved in the call. *Pool* did not hold that circumstantial evidence cannot be sufficient to authenticate a call, as suggested by the parenthetical used by the Court of Appeals, but instead held that the circumstantial evidence presented in that case was insufficient to make the very specific and particular showing required of the government under its theory of the case. In this case, Berardi's theory as to her constructive discharge claims did not require a showing that a *particular* A-B employee was the caller. Instead, the point in this case was that the caller, whoever he was, was an A-B employee. Indeed, had it been possible to identify the specific person involved, Berardi could have asked A-B to deal with that person directly (by transfer of the offender or otherwise), and remained in the RPB, rather than attempting to get out of the RPB to escape from the working conditions that produced her profound fear and apprehension. It was the very fact the caller could not be specifically identified beyond the conclusion that he was from the brewery, and therefore could not be dealt with directly, that makes A-B's actions in blocking, rather than facilitating, her attempts to get out of the RPB actionable under Title VII. The exclusion of all evidence of the calls prevented Berardi from presenting this crucial aspect of her case to the jury.

In addition, the exclusion permitted A-B to unfairly portray Berardi as a paranoid before the jury. A-B repeatedly, in opening statement and final argument, emphasized the intense fear and apprehension which Berardi clearly felt concerning continuing to work in the RPB, but also argued that there was nothing whatsoever to justify that fear. Thus, A-B was able to exclude the calls while at the same time commenting on Berardi's alleged failure to explain or justify her fearfulness – an explanation she could not make because of the exclusion of the calls. A-B was thus allowed to portray plaintiff as a paranoid, and to thereby destroy her credibility as a witness. A-B made references to Berardi's "paranoia" and "perception of reality" which "is quite different from what really transpired." (1:34-35). A-B argued to the jury that Berardi's unhappiness was due to "factors peculiar to her", and that plaintiff had a "different perspective of reality than some of the rest of us might", and that there was evidence of her "paranoia" and that she had no "real explanation" of her fear (M. 27-29), and that her feelings of persecution . . . really aren't based on reality" (M. 37).

These arguments were particularly egregious since the evidence that would have furnished the explanation of Berardi's fearfulness had been excluded at A-B's behest. Berardi's credibility, and her ability to accurately judge and recall the events she experienced, was crucial to the entire case, not just the claims of constructive discharge. Thus, the error in the exclusion of evidence infected the trial of the entire case, rendering it fundamentally unfair.

Thus, this case presents an important issue in the manner in which gender discrimination cases of this kind

are tried: specifically, whether such unfair evidentiary exclusions may be used by defendants to use the very psychological damage inflicted in the workplace to destroy plaintiffs as witnesses while hiding from the jury the working conditions that led to that damage. Such a result is surely not what this Court intended in broadening the scope of Title VII protection beyond cases of serious psychological harm in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367 (1993), and the result in this case is fundamentally at odds with the approach taken in *Harris*. This Court's writ of certiorari should be issued to the Court of Appeals.

CONCLUSION

For the foregoing reasons and based upon the aforecited authorities, petitioner respectfully prays this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Counsel of Record for Petitioner
Jody M. Berardi

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94-2063

Jody M. Berardi, Appellant, v. Anheuser-Busch, Inc., a Corporation, Appellee.	* * * * * * * * *	Appeal from the United States District Court for the Eastern District of Missouri. [UNPUBLISHED]

Submitted: December 15, 1994

Filed: February 16, 1995

Before MAGILL and BEAM, Circuit Judges, and SHANAHAN,* District Judge.

PER CURIAM.

Jody M. Berardi appeals the district court's[1] judgment in favor of Anheuser-Bush in this employment

*THE HONORABLE THOMAS M. SHANAHAN, United States District Judge for the District of Nebraska, sitting by designation.

[1] The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

discrimination action, challenging two evidentiary rulings. Although we have been provided with numerous squabbles and with lengthy and detailed recitations of the facts,[2] we state only the facts necessary to frame the issues on appeal.

Berardi began working for Anheuser-Busch in 1985. She began work as a freight handler, a union hourly position. There was conflicting evidence as to whether gender-based comments and pornographic materials were prevalent in the workplace. There was also conflicting evidence as to whether female employees were given less desirable work assignments or conditions.

In 1989, Berardi attempted to move into a position as a brewing supervisor. In 1990, after obtaining a college degree and passing a series of tests and interviews, she took a job at the Research Pilot Brewery (RPB) in St. Louis. The RPB is a training brewery that prepares brewing supervisors for positions in Anheuser-Busch's other breweries. At approximately the same time that she began working at the RPB, Berardi allegedly began to receive intimidating anonymous phone calls. Also,

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[2] Anheuser-Busch moves to strike the deposition testimony of Lois Daniels, Ahmad Ardekani, Albert Linnebach, Donald Burnell and Jody Berardi. We deny this motion as regards the materials appended to Berardi's "Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment" and materials accompanying the letter of March 19, 1993, to Judge Gunn from Samuel Liberman. We grant it in all other respects.

We deny Anheuser-Busch's second motion to strike in its entirety.

We grant Berardi's motion to strike Anheuser-Busch's 28(j) response.

shortly after she began working at the RPB, three hoses with which she was working "blew up." Berardi discussed the phone calls and the hose incidents with several persons, including company security, and certain precautionary action was taken. In 1991, Berardi requested a return to her previous position as a freight handler, which was denied. Shortly thereafter, Berardi was offered a position as brewing supervisor at Anheuser-Busch's Columbus brewery, which she rejected. Berardi received no other offers. She took a leave of absence in September 1991, and resigned shortly after returning to work.

Berardi filed the instant action in 1993, alleging violations of Title VII, 42 U.S.C. § 2000e to § 2000e-17 (1994), and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010 to § 213.030 (1983 & Supp. 1994). The district court granted Anheuser-Busch's motion in limine and excluded evidence of the unauthenticated telephone calls. The district court also excluded evidence of the work histories of other women who successfully completed the RPB program, finding such evidence to be irrelevant to Berardi's claims. The MHRA claims were tried to a jury that returned a verdict in favor of Anheuser-Busch. The district court made findings of fact and conclusions of law based on the jury verdict and entered judgment in favor of Anheuser-Busch on the Title VII claims. Berardi timely appealed, challenging the district court's exclusion of the phone calls and work histories.

We review the district court's exclusion of evidence for inadequate authentication for abuse of discretion. *United States v. Hamell*, 931 F.2d 466, 469 (8th Cir.), *cert.*

denied, 502 U.S. 928 (1991); *see Estes v. Dick Smith Ford*, 856 F.2d 1097, 1102-03 (8th Cir. 1988) ("unfairly prevent[ing] a party from proving his case" is abuse of discretion). Admission of the phone calls required Berardi to prove that the calls were made by Anheuser-Busch employees. However, Berardi was unable to identify the caller as an Anheuser-Busch employee. The caller did not identify himself as an Anheuser-Busch employee, and Berardi could not identify the caller's voice. The contents and circumstances of the calls were also insufficient authentication. *See United States v. Pool*, 660 F.2d 547, 560 (5th Cir. Unit B Nov. 1981) (circumstances alone insufficient authentication). We do not consider Berardi's additional arguments that were not presented to the district court. *United States v. Pugliesi*, 712 F.2d 1574, 1580 (2d Cir. 1983).

We also review the exclusion of the work histories of other women in other breweries as irrelevant for abuse of discretion. *United States v. Carpenter*, 11 F.3d 788, 789 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1570 (1994). As these histories involved different persons at different facilities, we find no abuse of discretion. *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988). Extended discussion would serve no useful purpose. Accordingly, we affirm the district court without further discussion. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-2063EMSL

Jody M. Berardi, Appellant, vs. Anheuser-Busch, Inc., a Corporation, Appellee.	* * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 7, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JODY M. BERARDI, Plaintiff,	)	No. 4:92CV01059 GFG
vs.	)	(Filed Apr. 15, 1994)
ANHEUSER-BUSCH, INC., Defendant.	)	

ORDER AND JUDGMENT

Pursuant to the Memorandum Opinion filed on this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendant is entitled to judgment in its favor on plaintiff's Title VII claims.

IT IS FURTHER ORDERED that defendant's motion to strike plaintiff's reply shall be and it is denied.

Dated this 15th day of April, 1994.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JODY M. BERARDI, Plaintiff, vs. ANHEUSER-BUSCH, INC., Defendant.	)	No. 4:92CV01059 GFG (Filed Apr. 15, 1994)

MEMORANDUM OPINION

In this action, plaintiff, Jody M. Berardi, a former employee of defendant Anheuser-Busch, Inc., alleges that she was subjected to sexual harassment, sex discrimination, and retaliation during the course of her employment in violation of the Missouri Human Rights Act (MHRA), Mo. Rev. Stat., § 213.010, and 42 U.S.C. § 2000e, *et seq.* (Title VII). This cause came before the Court for trial on August 9, 1993. Plaintiff's claims under the MHRA were tried before a jury and her claims under Title VII were tried to the bench. On August 13, 1993, the jury returned a verdict in favor of defendant and against plaintiff on all claims under the MHRA. The Court having heard the testimony and having examined all the evidence offered by the respective parties, and being fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52 with regard to plaintiff's Title VII claims.

Plaintiff Jody M. Berardi was employed by Anheuser-Busch, Inc. on April 22, 1985, as a union freight handler.

For the majority of her tenure as a freight handler, plaintiff was assigned to the Maintenance/Labor Area, where she performed general maintenance and cleaning tasks. Pursuant to the Court's Order of May 6, 1993, granting defendant's motion for partial summary judgment, plaintiff cannot recover for any acts of alleged sexual harassment or sex discrimination that occurred while she was employed as a freight handler because plaintiff failed to file a timely charge of discrimination with the EEOC regarding these alleged events.

In June 1990, after completing her college degree, plaintiff was hired as an Experimental Brewer in defendant's Research Pilot Brewery (RPB). The RPB is a department of Anheuser-Busch responsible for developing new products and brewing processes. In addition, the RPB trains certain employees in brewing operations with the expectation that upon successful completion of RPB training, these individuals will be available to interview for the position of Brewing Supervisor Trainee at any of defendant's twelve breweries.

Plaintiff alleges that certain events occurred while she was employed in the RPB which constitute sexual harassment, sexual discrimination and retaliation for the filing of a charge of discrimination with the EEOC and the Missouri Commission on Human Rights. As a result of the alleged incidents, plaintiff, in May 1991, requested that she be permitted to return to her position as a freight handler. Defendant refused to permit her to return to this position because there were no openings for freight handlers at that time.

In June 1991 plaintiff interviewed for and was offered the position of Brewing Supervisor Trainee at defendant's Columbus, Ohio brewery. Plaintiff declined this position.

On June 7, 1991, plaintiff filed a timely charge of discrimination with the EEOC. The charge does not mention any incidents of sexual harassment or sex discrimination during plaintiff's tenure as a freight handler.

Thereafter, plaintiff's file was reviewed at defendant's Houston, Baldwinsville and St. Louis breweries for potential Brewing Supervisor Trainee positions. Jeremiah J. Carew, the Senior Brewmaster of Anheuser-Busch's St. Louis brewery, reviewed plaintiff's file but decided not to hire plaintiff as a Brewing Supervisor Trainee at the St. Louis brewery. Mr. Carew found various deficiencies in plaintiff's qualifications, among them her absentee record and the fact that she had received only average scores on her performance appraisals. In addition, in the fall of 1989, Mr. Carew had made a commitment to Local 6, the union that represents freight handlers and brewery workers, to hire a Brewing Supervisor Trainee from the union ranks, provided that individual met certain educational and testing criteria. David Bradford applied for and was selected for this position in the fall of 1989. Plaintiff did not apply for the position in the fall of 1989. In the fall of 1989, after Bradford was selected but before Carew extended a formal offer to him, a company-wide hiring freeze was imposed. In the summer of 1991, the hiring freeze was lifted and Mr. Carew determined that he would offer the position to Bradford. Mr. Carew had no knowledge that plaintiff had filed a charge of discrimination.

Mary Wiles, Assistant Brewmaster at the Baldwinsville brewery, reviewed plaintiff's file and decided not to hire plaintiff as a Brewing Supervisor Trainee at the Baldwinsville brewery because plaintiff had low test scores in two areas that Ms. Wiles considered critical for Brewing Supervisor Trainees and because she lacked a science background. Ms. Wiles had no knowledge that plaintiff had filed a charge of discrimination at the time that she decided not to hire plaintiff.

Jim Misthos, the Assistant Brewmaster of defendant's Houston brewery, also reviewed plaintiff's file and decided not to hire plaintiff as a Brewing Supervisor Trainee at the Houston brewery. Mr. Misthos determined not to hire plaintiff because he believed, on the basis of plaintiff's interview, that she was unwilling to work the overtime shift schedule anticipated at the Houston facility. In addition, Mr. Misthos found plaintiff unable to answer basic questions regarding her training in the RPB. Mr. Misthos was unaware that plaintiff had filed a charge of discrimination.

On July 3, 1991, plaintiff received notice that her file would not be sent to any other breweries for six months to a year in order to increase her chances of subsequently obtaining a position as a Brewing Supervisor Trainee.

On September 3, 1991, plaintiff voluntarily took a six-month, paid leave of absence. On March 2, 1992, plaintiff returned to work because her sick leave had expired. Plaintiff voluntarily resigned from her position with Anheuser-Busch on May 19, 1992.

The following claims under the MHRA were submitted to the jury:

a. Plaintiff's claim that she was subjected to sexual harassment while employed in the Research Pilot Brewery;

b. Plaintiff's claim that she was not transferred to the position of freight handler because of her gender;

c. Plaintiff's claim that she was not promoted to the position of Brewing Supervisor Trainee because of her gender;

d. Plaintiff's constructive discharge claim relating to her departure from the RPB;

e. Plaintiff's claim that she was not transferred to the position of freight handler in retaliation for having filed a charge of discrimination;

f. Plaintiff's claim that she was not promoted to the position of Brewing Supervisor Trainee in retaliation for having filed a charge of discrimination;

g. Plaintiff's claim that she was forced to resign from her position in the RPB in retaliation for having filed a charge of discrimination; and

h. Plaintiff's claim for punitive damages.

The jury returned a verdict in favor of defendant and against plaintiff on all of the foregoing claims and the Court entered judgment in accordance with the jury verdict.

With regard to plaintiff's Title VII claims, this Court concurs with and adopts the aforementioned findings of the jury.

With regard to plaintiff's claim that she was subjected to sexual harassment while employed by defendant, the Court finds that plaintiff was not subject to any unwelcome sexual harassment while employed by defendant. The Court finds that statements allegedly made to plaintiff by her supervisor, Mr. Linnebach, and by Dr. Burnell as well as the conduct of management personnel and plaintiff's co-workers in the RPB do not constitute sexual harassment, discrimination based upon sex or unlawful retaliation.

With regard to plaintiff's claim that she was not transferred to the position of freight handler because of her gender, the Court finds that there were no openings for freight handlers at the time plaintiff requested to return to that position. The Court further finds plaintiff's sex was not a factor in defendant's decision not to return plaintiff to the position of freight handler.

With regard to plaintiff's claim that she was not promoted to the position of Brewing Supervisor Trainee because of her gender, the Court finds that plaintiff lacked the qualifications established by management for the positions at the three breweries where she applied. The Court further finds that plaintiff's gender was not a factor in defendant's decision not to promote plaintiff to the position of Brewing Supervisor Trainee.

With regard to plaintiff's claim that she was forced to resign her position in the RPB because of her gender, the Court finds that plaintiff's working conditions at the time of her resignation were not so intolerable that a reasonable person in plaintiff's circumstances would have felt compelled to resign. The working environment was not

objectively hostile or abusive. The Court finds that plaintiff's resignation was voluntary. Finally, the Court finds that plaintiff's gender was not a factor affecting defendant's actions toward her during the time she worked in the RPB. The Court therefore concludes that plaintiff was not subjected to sexual harassment or discrimination in violation of Title VII. *See Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993).

With regard to plaintiff's claim that she was not transferred to the position of freight handler in retaliation for having filed a charge of discrimination, the Court finds that plaintiff's charge was filed after the transfer decision was taken. The Court therefore finds that the supervisors who made the decision to not transfer plaintiff from the RPB to the position of freight handler were not aware of or influenced by plaintiff's subsequent filing of a charge of discrimination. The Court further finds that retaliation against plaintiff for having filed a charge of discrimination was not a factor in defendant's decision not to return plaintiff to the position of freight handler.

With regard to plaintiff's claim that she was not promoted to the position of Brewing Supervisor Trainee in retaliation for having filed a charge of discrimination, the Court finds that management employees who selected the Brewing Supervisor Trainees at these three breweries were not aware that plaintiff had filed a charge of discrimination. The Court therefore finds that retaliation against plaintiff for having filed a charge of discrimination was not a factor in the decision(s) not to hire plaintiff as a Brewing Supervisor Trainee.

With regard to plaintiff's claim that she was forced to resign from her position in the RPB in retaliation for having filed a charge of discrimination, the Court finds that retaliation against plaintiff for having filed a charge of discrimination did not affect defendant's actions toward her. On the basis of the foregoing, the Court concludes that plaintiff was not subjected to adverse employment action or retaliation in violation of Title VII. *Marzec v. Marsh*, 990 F.2d 393, 395-96 (8th Cir. 1993).

Dated this 15th day of April, 1994.

/s/ George F. Gunn Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JODY M. BERARDI, Plaintiff vs. ANHEUSER-BUSCH, INC., Defendant.	)	No. 4:92CV1059GFG (Filed Aug. 13, 1993)

JUDGMENT

This action was tried before the Court and a jury, Honorable George F. Gunn, Jr., District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdicts;

It is ORDERED and ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff its costs of action.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

Dated at St. Louis, Missouri
this 13th day of August, 1993.

APPENDIX E

RULE 901 OF THE FEDERAL RULES OF EVIDENCE

Rule 901. Requirement of Authentication of Identification.

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of a witness with knowledge. Testimony that a matter is what it claims to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity and not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, and other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through

mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules

prescribed by the Supreme Court pursuant to statutory authority.

Supreme Court, U.S.
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No. 95-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JODY M. BERARDI,
Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED BY PETITIONER

Was evidence of intimidating and harassing phone calls made to a plaintiff in a Title VII gender discrimination case, properly excluded for lack of authentication that the calls had been made by an employee of the defendant, when the evidence before the District Court was that the defendant's own security and personnel officers concluded that the caller could be from the defendant's facility?

LIST OF PARTIES

Jody M. Berardi, Petitioner, is an individual residing in the State of Missouri. Respondent, Anheuser-Busch, Inc., is a Missouri corporation with its principal place of business in St.Louis, Missouri.

TABLE OF CONTENTS

	Page
Question Presented by Petitioner	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Rules Involved	2
Statement of the Case	2
Summary of Argument	4
Reasons for Denying the Petition for a Writ	6
Conclusion	13

TABLE OF AUTHORITIES

Page(s)

Cases:

Campbell v. Ingersoll Milling Machine Co., 893 F.2d 925 (7th Cir. 1990), *cert. denied*, 498 U.S. 844 (1990) 13

Di Paola v. Riddle, 581 F.2d 1111 (4th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) 12

Foster v. Ford Motor Co., 621 F.2d 715 (5th Cir. 1980) 9

Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572 (10th Cir. 1990) 11

Hukkanen v. International Union of Operating Engr's, Hoisting & Portable Local 101, 3 F.3d 281, 284 (8th Cir. 1993) 9,10

May v. Arkansas Forestry Comm'n, 993 F.2d 632 (8th Cir. 1993) 6

Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130 (4th Cir. 1988) 11,12

Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989) 10

United States v. Pool, 660 F.2d 547 (5th Cir. 1981) 7,8

United States v. Pugliese, 712 F.2d 1574 (2d Cir. 1983) 9

Wheeler v. Sims, 951 F.2d 796 (7th Cir. 1992) 6

Statutes:

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 2

28 U.S.C. §1331 2

28 U.S.C. §2101(c) 2

Mo.Rev. Stat. §213.010, *et seq.* 3

42 U.S.C. §2000e, *et seq,* 2,3

Rules:

Fed.R.Evid. 101 8

Fed.R.Evid. 101(a) 8

Fed.R.Evid. 103(a) 11,12

Fed.R.Evid. 403 13

Fed.R.Evid. 901 8

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Respondent, Anheuser-Busch, Inc., respectfully requests that the Court deny the Petition for a Writ of Certiorari requested herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reproduced in Petitioner's Appendix (hereinafter "Pt. App.") at pages A-1 through A-4. The opinion is unpublished. The order of the Court of Appeals for the Eighth Circuit denying the petition for rehearing and suggestions for rehearing en banc was filed on April 7, 1995 and is reproduced in Petitioner's Appendix at B-1.

The judgment of the District Court, along with its memorandum opinion, regarding claims that were triable to and decided by the court, was filed on April 15, 1994, and is reproduced in Petitioner's Appendix at C-1 through C-9. The order entering judgment on the jury verdict regarding those claims that were tried to the jury was filed on August 13, 1993, and is reproduced in Petitioner's Appendix at D-1.

JURISDICTION

This Court has jurisdiction to review the order dated April 7, 1995 denying Berardi's Petition for Rehearing and Suggestions for Rehearing en banc of the Court of Appeals for the Eighth Circuit by a Writ of Certiorari filed on or about July 6, 1995, pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

The Court of Appeals for the Eighth Circuit had jurisdiction over the appeal from the judgment of the United States District Court pursuant to 28 U.S.C. §1291. The District Court below had jurisdiction of this claim of a violation of Title VII, 42 U.S.C. §2000e, *et seq.* pursuant to 28 U.S.C. §1331.

RULES INVOLVED

Federal Rule of Evidence 901, set forth in Petitioner's Appendix E.

STATEMENT OF THE CASE

Berardi began working for Anheuser-Busch, Inc. (hereinafter "Anheuser-Busch") in 1985. At that time, she was employed as a freight handler, a union, hourly position. Although Berardi adduced evidence that there were gender-based comments and pornographic materials in the workplace, Anheuser-Busch adduced evidence that such materials were not displayed and that they were not prevalent in the workplace. Anheuser-Busch also adduced evidence that, for the most part, female employees failed to complain about any alleged co-worker harassment, and that on those occasions when complaints were made, Anheuser-

Busch took appropriate remedial action. In addition, Anheuser-Busch adduced evidence that jobs were assigned in a non-discriminatory manner.

In 1989, despite the alleged harassment, Berardi attempted to move into a management position as a brewing supervisor. In 1990, after obtaining a college degree and passing a series of tests and interviews, she took a job at the Research Pilot Brewery ("RPB") in St. Louis. The RPB is a training facility that prepares brewing supervisor trainees for positions in Anheuser-Busch's other breweries. At approximately the same time that she began working in the RPB, Berardi allegedly began to receive intimidating anonymous phone calls at her home. Also, shortly after she began working in the RPB, three hoses with which she was working "blew up." Berardi discussed the phone calls and the hose incidents with several persons, including company security personnel, and certain precautionary action was taken. In 1991, Berardi requested a return to her previous position as a freight handler, which was denied. Shortly thereafter, Berardi was offered a position as a brewing supervisor trainee at Anheuser-Busch's Columbus brewery, which she rejected. Thereafter, Berardi took a six-month leave of absence in September, 1991. She returned to work in March, 1992. Berardi tendered her letter of resignation on May 6, 1992. Thereafter, Berardi continued to work until May 19, 1992.

Berardi filed the instant action in 1992, alleging violations of Title VII, 42 U.S.C. §2000e, *et seq.*, and the Missouri Human Rights Act ("MHRA"), Mo.Rev. Stat. §213.010, *et seq.* At trial, Anheuser-Busch filed a Motion in Limine asking the District Court to exclude all evidence regarding the phone calls that Berardi received at her home on the basis that Berardi was unable to authenticate the phone calls as coming from an employee of Anheuser-Busch. (A. 158-9, Supp.App. 7-8).[1] The District

[1] Plaintiff-Appellant's Appendix will be referred to as "A." Defendant-Appellee's Supplemental Appendix will be referred to as "Supp.App."

Court granted the Motion in Limine. (A. 167). Thereafter, immediately prior to the presentation of the evidence, counsel for Berardi addressed the Court, on the record, and requested the Court to reconsider its ruling regarding the phone calls. As the basis for this request, counsel argued that there was sufficient evidence to authenticate the phone calls as coming from employees of Anheuser-Busch. (T. 1-1 to T. 1-6). In that regard, counsel for Berardi described for the District Court the timing of the phone calls and the circumstances that he believed provided sufficient authentication of the telephone calls. (T. 1-1 to T. 1-3).

Thereafter, during the direct examination of Berardi, her counsel made an offer of proof regarding the telephone calls. (T. 1-93). Berardi claims that the offer of proof "included Berardi's affidavit and other pretrial material offered in opposition to her Motion in Limine." (Pt. Brief at 9). To the contrary, the offer of proof did not refer to "other pretrial material offered in opposition to her Motion in Limine." The offer of proof referred to Berardi's affidavit and "all of the stuff that was submitted before for that." (T. 1-93). Plaintiff's counsel never identified the additional material to which he was referring in making the offer of proof. The District Court overruled the offer of proof.

SUMMARY OF ARGUMENT

A federal district court has wide discretion in ruling on the admission of evidence. Berardi seeks review of the District Court's ruling that the anonymous phone calls were inadmissible because Berardi could not authenticate the phone calls as coming from an Anheuser-Busch employee. There is simply no special or important reason for this Court to review this evidentiary ruling of the District Court.

In addition, the District Court's ruling excluding the evidence was correct. In the District Court, the only ground that Berardi put forth for the admission of the phone calls was that the timing of the phone calls provided a sufficient foundation to authenti-

cate the phone calls. The District Court correctly concluded that the circumstances of the calls were insufficient to authenticate the phone calls as coming from Defendant's employees.

The other grounds that Berardi raises for the admission of the phone calls were not raised in the District Court and were not preserved for review. Further, even if these arguments had been preserved for review, the exclusion of the calls did not affect a substantial right of Berardi.

REASONS FOR DENYING THE PETITION FOR A WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Petitioner does not suggest that the decision of the Court of Appeals for the Eighth Circuit conflicts with any decision of this Court or that of any other circuit. Petitioner does not suggest that the decision of the Court of Appeals for the Eighth Circuit deviates from the accepted and usual course of proceedings. Berardi's contention is simply that the District Court, exercising its discretion in the admission of evidence, erred in its ruling that the phone calls were inadmissible because Berardi could not authenticate the calls as coming from an employee of Anheuser-Busch. A federal district court is entitled to substantial deference in its ruling regarding the admission of evidence, and its rulings excluding evidence will be reversed only if the district court committed a clear abuse of discretion. *May v. Arkansas Forestry Comm'n*, 993 F.2d 632, 637 (8th Cir. 1993). In sum, there is nothing special or far-reaching about the decision of the Court of Appeals for the Eighth Circuit that would justify the consideration of this Court.

The trial court held that the phone calls were inadmissible because Berardi failed to authenticate the calls. (T. 1-3 to T. 1-7; T. 1-93; A. 158-59; Supp.App. 7-8). In determining whether the trial court abused its discretion in excluding the calls, the inquiry is not whether the reviewing court would have ruled differently if they were considering the issue in the first place, but whether or not the trial court's ruling has a rational basis. *Wheeler v. Sims*, 951 F.2d 796, 802 (7th Cir. 1992) (citations omitted).

The District Court did not abuse its discretion in concluding that Berardi could not authenticate the calls. Berardi's Affidavit establishes that Berardi could not identify the caller's voice. (Berardi Affidavit, ¶12, A. 83). Further, the caller never identi-

fied himself as an employee of Anheuser-Busch, nor did he provide any information suggesting that he was an employee of Anheuser-Busch. (Berardi Affidavit, ¶¶11-12, 20, 35, 48, A. 82-83, A. 88, A. 90). The only connection between the calls and Anheuser-Busch is the fact that the calls allegedly began on the evening of the day on which a person who claimed to be Berardi's supervisor obtained her phone number from her mother.[2]

In reaching its conclusion that the mere coincidence of the calls does not provide a sufficient foundation to authenticate the calls, the Court of Appeals for the Eighth Circuit relied upon *United States v. Pool*, 660 F.2d 547, 569 (5th Cir. 1981). *Berardi v. Anheuser-Busch, Inc.*, No. 94-2063 EMSL slip op. at 3 (8th Cir. February 16, 1995) (Pt.App. A-4). In *Pool*, a defendant was allegedly involved in a conspiracy to import and distribute marijuana which was discovered by a clandestine undercover operation. Defendant's conviction was based on the fact that an individual, using the nickname that the defendant used in the undercover operation, told the government agent that another defendant wanted the agent to obtain a boat to transport marijuana. The Court of Appeals for the Fifth Circuit ruled that the circumstances of the call did not provide sufficient authentication of the call, despite the fact that only someone with the clandestine operation would have contacted the agent with this request and used this particular nickname. Berardi has even less evidence connecting the phone calls to Anheuser-Busch. Unlike the content of the calls at issue in *Pool*, nothing in the content of the calls to Berardi suggested that the caller was an employee of Anheuser-Busch.

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[2] Berardi also claimed that *on one occasion*, a year and a half after the calls began, she received a call in which Anheuser-Busch advertising jingles were played. (Berardi Affidavit, ¶40, A. 10). This fact does not demonstrate that the calls came from Defendant's employees. The advertising jingles were played on national television, and anyone with a tape recorder could tape them. Thus, it is just as likely that the calls were made by someone not employed by the brewery, who was aware that Berardi worked there.

Berardi argues that *Pool* is inapplicable to the instant case because *Pool* was a criminal case and the state bore the burden of proving the defendant's guilt by a reasonable doubt. Thus, Berardi argues the Court of Appeals for the Fifth Circuit excluded the phone calls because the standard for authentication of phone calls is higher in a criminal case than a civil case. (Pt. Brief at 28). However, Berardi cites no authority for the proposition that the rules for the authentication of evidence differ depending on whether a case is a criminal or a civil case. To the contrary, Federal Rule of Evidence 101 provides that the Federal Rules of Evidence "govern proceedings in the courts of the United States ...." Fed.R.Evid. 101 draws no distinction between civil and criminal cases with respect to the applicability of the rules of evidence.

Berardi also argues that the phone calls are admissible because Defendant's employees concluded, based upon the facts before them, that the phone calls came from Defendant's employees. Notably, Berardi cites no authority for the proposition that the *conclusion* of a *witness* that the phone calls are from a particular source provides sufficient authentication of phone calls. Under the Federal Rules of Evidence, it is the sole province of the district court to determine whether or not the phone calls are admissible because there has been sufficient authentication. Fed.R.Evid. 101(a), Fed.R.Evid. 901. To substitute the conclusion of a witness for that of the district court is to invade the province of the district court in ruling on the admissibility of evidence.

Berardi also claims that the phone calls were relevant to her claim of constructive discharge because the jury could have concluded that she was justified in resigning her position in the RPB because she feared for her safety. Berardi failed to preserve this argument for review because she failed to make it before the District Court. The *only* evidence presented by Berardi's trial counsel was that the phone calls were admissible as direct

evidence of sexual harassment coming from Defendant's employees. This is evident from the fact that: 1) Berardi's response to the Motion in Limine stated that "[t]he evidence is certainly sufficient to allow the jury to consider the calls as part of the harassment" (A. 161); 2) in the colloquy that occurred on the first day of trial when Berardi asked the trial judge to reconsider the ruling on the phone calls, Berardi argued only that there was sufficient evidence to authenticate the calls (T. 1-1 to T. 1-7); 3) Berardi's offer of proof during Berardi's direct examination was merely a request that the trial court consider Berardi's Affidavit setting forth the circumstances of the calls (T. 1-93); and 4) Plaintiff's Motion for a New Trial or for Judgment Notwithstanding the Verdict stated that "[t]he Court errored [sic] in ...excluding all evidence of harassing phone calls ...because of circumstances indicated [sic] that such phone calls ...were related to her employment and under the circumstances could only have been made by someone employed at the Defendant company." (A. 240). Berardi never asserted at trial that the calls were relevant to show a justification for Plaintiff's alleged fear. By failing to raise this ground for admissibility of the calls to the trial court, Berardi has waived it. *United States v. Pugliese*, 712 F.2d 1574, 1580 (2d Cir. 1983); *Foster v. Ford Motor Co.*, 621 F.2d 715, 721 (5th Cir. 1980).

Further, even if Berardi had preserved her argument that the calls were relevant to her claim of constructive discharge, Berardi's receipt of anonymous harassing phone calls at her home is irrelevant to her claim of constructive discharge. "A constructive discharge exists when an *employer* deliberately renders the employee's working conditions intolerable and thus forces [the employee] to quit ...." *Hukkanen v. International Union of Operating Engr's, Hoisting & Portable Local 101*, 3 F.3d 281, 284 (8th Cir. 1993) (citing *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)) (emphasis supplied). Alternatively, plaintiffs may prove a constructive discharge by "showing their resignation was a reasonably foreseeable conse-

quence of *their employer's discriminatory actions*." *Id.* at 285 (emphasis supplied). Thus, in order for the phone calls to be relevant to her claim for constructive discharge, Berardi must produce admissible evidence that the intolerable condition is attributable to Anheuser-Busch.

The fact that Berardi received harassing phone calls at her home has no bearing on her claim for constructive discharge. If Berardi identified the calls as coming from her next door neighbor, surely she would not argue that those phone calls would be evidence supporting a constructive discharge claim. They would not be attributable to Anheuser-Busch. Consequently, Berardi's receipt of anonymous harassing phone calls at her home is no different. Not being attributable to Anheuser-Busch, they are not evidence that would support a constructive discharge claim.

Berardi has failed to cite a single case in which a court has imputed liability to an employer for an employee's constructive discharge based on the receipt of anonymous phone calls. Berardi cites *Hukkanen*, *supra*, 3 F.3d at 281, and *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989) in support of her claims that the phone calls were relevant to her constructive discharge. However, in those cases, the plaintiffs were subjected to sexual harassment by management level employees whom the plaintiffs were readily able to identify. Neither case involved harassment from an anonymous source that the plaintiff could not link to the employer. Thus, neither case supports Berardi's contention that anonymous phone calls can be used to establish co-worker harassment. Berardi's suspicion that the calls were made by employees of Anheuser-Busch does not suffice for admissible evidence. Mere suspicion does not make the phone calls relevant to a constructive discharge claim.

Even if Berardi is correct that the phone calls should have been admitted, the exclusion of the evidence is reversible error only if the exclusion of the evidence affected a substantial right of

Berardi. Fed.R.Evid. 103(a); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1135 (4th Cir. 1988). There was abundant evidence that Berardi's working conditions were not intolerable at any point in time and that this was particularly true during the period of time immediately preceding her resignation. Notably, Berardi's own actions belie any claim that her working conditions were intolerable. Berardi returned from her leave of absence and worked for approximately two and a half months prior to tendering her letter of resignation. (T. 1-126 to T. 1-128, T. 2-11, T. 2-74). Berardi herself characterized her act as a "resignation" and nothing in her letter of resignation suggests that she was forced to resign. (T. 2-74, Supp.App., 158). Further, Berardi worked during the two week period after she provided her notice of resignation. (T. 2-74). Berardi's offer of proof demonstrated that for the two and a half months prior to her resignation, *Plaintiff received no phone calls.* (Plaintiff's Affidavit, ¶¶46-48, A. 90). Accordingly, Berardi's prior receipt of the phone calls had little, if any bearing, on the circumstances that existed in the RPB in the two and a half month period prior to her resignation. *See*, *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 580 (10th Cir. 1990) (focus of constructive discharge analysis is on the situation that existed near the time of plaintiff's resignation).

Berardi also argues that the phone calls were admissible to explain her paranoia. However, as set forth above, Berardi failed to present this argument to the District Court and has waived it. Even if this argument had been preserved for review, this argument is without merit. Dr. Ardekani, Berardi's psychiatrist and expert witness, testified in his deposition that Berardi was paranoid, presumably as a result of the phone calls. Without authentication, there was no admissible evidence linking the calls to Anheuser-Busch. Unless Berardi's paranoia was the result of calls that she received from employees of Anheuser-Busch, the source of the paranoia is irrelevant.

Berardi also believes that it was unfair to permit Anheuser-Busch to elicit evidence that Berardi was paranoid without allowing Berardi to explain the reasons for her paranoia. However, Berardi was well aware that Anheuser-Busch intended to elicit evidence of her paranoia. Anheuser-Busch informed the jury of that fact in opening statement and then elicited the evidence during the cross-examination of Dr. Ardekani. (T. 1-34 to T. 1-35, T. 3-56 to T. 3-57). If Berardi felt that it was prejudicial for the trial court to permit Anheuser-Busch to elicit this evidence, it was incumbent upon Berardi to ask the trial court to admit the evidence of the phone calls subject to a limiting instruction that they were admissible only to show that Berardi had a reason to be fearful. Having failed to do this, Berardi cannot now claim that the trial court committed reversible error. *Di Paola v. Riddle*, 581 F.2d 1111, 1113 (4th Cir. 1978), *cert. denied* 440 U.S. 908 (1979).

In addition, the exclusion of this evidence would be grounds for reversal only if the exclusion of the evidence affected a substantial right of Berardi. Fed.R.Evid. 103(a); *Mullen*, *supra*, 853 F.2d at 1135. The exclusion of the evidence that Berardi was paranoid, presumably because of her receipt of the phone calls, did not affect a substantial right of Berardi's. Berardi presented ample evidence which, if believed, would have justified Plaintiff's fear for her safety in the RPB. She testified that on three occasions within the space of three days, high-pressure hoses with which she was working came off of their fittings, resulting in explosions of gas. (T. 1-91 to T. 1-104, T. 1-173 to T. 1-179). She testified that she was fearful after these incidents. (T. 1-123, T. 2-83). These incidents, with their potential for physical harm, are clearly more significant than Berardi's receipt of anonymous harassing phone calls. She testified that she reported the hose incidents to various employees of Anheuser-Busch and that security measures were taken, including the provision of a two-way radio and an escort to her car. (T. 1-94 to T. 1-95, T. 1-99 to T. 1-102, T. 3-82 to T. 3-85, T. 127, T. 129). She testified that

she was fearful of a co-worker and one of her managers. (T. 104, T. 1-168 to T. 1-169, T. 2-72). Plaintiff testified that Dr. Ahmad Ardekani, her treating psychiatrist, and Dr. Lois Daniels, her therapist, told her that she should resign from the RPB. (T. 1-125). If this were not enough, Berardi testified that the hostile work environment that purportedly existed when she was a freight handler contributed to her decision to resign from the RPB. (T. 2-63 to T. 2-64). The phone calls, therefore, were but a small part of Berardi's overall testimony and would not have made a significant difference in the outcome had this evidence been admitted.[3]

CONCLUSION

This case is not one appropriate for review by this Court. It does not present an issue of special importance. Moreover, the Court of Appeals for the Eighth Circuit correctly applied the law. Therefore, Respondent, Anheuser-Busch, Inc., prays this Court to dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

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[3] Further, if the phone calls had been presented, it was entirely possible that the admission of the evidence might have been unduly prejudicial to Anheuser-Busch, because the jury might have speculated that the calls came from employees of Anheuser-Busch, despite the absolute lack of any evidence supporting this conclusion. Fed.R.Evid. 403; *Campbell v. Ingersoll Milling Machine Co.*, 893 F.2d 925, 928-9 (7th Cir. 1990), *cert. denied* 498 U.S. 844 (1990).